

## Message Text

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R 250852Z MAR 75

FM AMEMBASSY BONN

TO SECSTATE WASHDC 8914

INFO CINCUSAREUR HEIDELBERG

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CINCUSAREUR FOR AEAJA-IA

CINCUSAREUR FOR AEAEN-FE

FOR L/PM AND EUR/CE

E.O. 11652: N/A

TAGS: MARR, GW

SUBJECT: RESISTANCE OF NATO SOFA SA SENDING STATES  
TO PAYMENT OF EQUALIZATION LEVY ADDED BY NEW FRG LAW  
TO ELECTRICITY BILLS

1. SUMMARY. AN FRG LAW IN FORCE AS OF JANUARY 1, 1975  
IMPOSES ON ELECTRIC POWER COMPANIES A LEVY BASED ON  
AND ADDITIONAL TO THE COST OF POWER DISTRIBUTED OR  
PRODUCED, THAT MAY BE SSED ON TO END-CONSUMERS,  
EARMARKED FOR A SPECIAL FUND DESIGNED TO HELP FINANCE  
THE CONSTRUCTION OF COAL-FIRED POWER PLANTS. NATO  
SOFA SA SENDING STATES AT THE FORCES-FINANCE MINISTRY  
LEVEL HAVE RESISTED PAYMENT OF THIS LEVY ON THE  
GROUNDS THAT IT REPRESENTS A FORM OF TAXATION FROM  
WHICH THEY ARE EXEMPT UNDER ARTICLE 67(1) OF NATO  
SOFA SA. SENDING STATES REPS HAVE NOW AGREED ON  
AN AD REFERENDUM TEXT OF AN AIDE-MEMOIRE FORMALLY  
TO RAISE THIS MATTER WITH THE FRG FOREIGN OFFICE.  
END SUMMARY.

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2. A FEDERAL LAW ENACTED IN 1974 AND ENTITLED LAW TO SECURE ELECTRICITY PRODUCTION FROM COAL IN THE FRG IS INTENDED TO ENSURE THE EQUALIZATION OF THE FUTURE HIGHER COST INCURRED BY EXISTING POWER STATIONS AS THE RESULT OF INCREASED USE OF COAL IN POWER PRODUCTION AND TO PROVIDE THE NECESSARY INCENTIVE FOR THE CONSTRUCTION OF NEW POWER STATIONS THAT ARE COAL-RATHER THAN OIL-FIRED (10 NEW, LARGE COAL-FIRED STATIONS ARE TO BE BUILT BY 1980). A SPECIAL FUND TO FINANCE CONSTRUCTION OF THESE POWER STATIONS IS TO BE RAISED BY THE IMPOSITION OF A SO-CALLED EQUALIZATION LEVY ON ELECTRIC POWER COMPANIES AND SELF-PRODUCERS, WHICH THESE ARE AUTHORIZED BY THE LAW TO PASS ON TO THE END-CONSUMERS OF THE ELECTRICITY DISTRIBUTED OR PRODUCED BY THEM. THE NEW LAW WHICH CAME INTO FORCE JANUARY 1, 1975, SETS THE LEVY FOR 1975 AS 3.24 PER CENT OF THE PROCEEDS OF THE ELECTRICITY DELIVERED OR OF THE VALUE OF THE ELECTRICITY PRODUCED. THE LEVY, IF IT IS PASSED ON TO THE END-CONSUMER AS IT WILL BE IN ALMOST EVERY CASE, IS TO BE BILLED AS A SEPARATE ITEM FROM THE COST OF THE ELECTRICITY DELIVERED.

3. USAREUR AND USAFE ESTIMATE THAT THE COST TO THE US FORCES IN THE FRG OF THIS LEVY WOULD BE \$1,955,340 PER YEAR AT CURRENT RATE OF CONSUMPTION.

4. REPRESENTATIVES OF THE SENDING STATES (US, UK, FRENCH, CANADIAN, BELGIAN, AND DUTCH) HAVE DISCUSSED THIS MATTER WITH REPRESENTATIVES OF THE FRG FINANCE MINISTRY, ARGUING THAT THE LEVY IMPOSED ON THE FORCES AS END CONSUMER CONSTITUTES A TAX FROM WHICH THE FORCES ARE EXEMPT PURSUANT TO ARTICLE 67(1) OF THE NATO SOFA SUPPLEMENTARY AGREEMENT. THEY HAVE ARGUED IN THE ALTERNATIVE THAT THE LEVY REPRESENTS THE FINANCING OF MAJOR CAPITAL INVESTMENTS IN THE FRG ELECTRIC UTILITIES SYSTEM WHICH THE FORCES SHOULD NOT BE REQUIRED TO PAY. THE FINANCE MINISTRY HAS RESPONDED ORALLY AND IN WRITING, STATING THAT THE LEVY IS PART OF THE PRICE FOR ELECTRICITY FURNISHED SO FAR AS THE END-CONSUMER IS CONCERNED, AND THAT EVEN IF THE LEVY IS CONSIDERED LIMITED OFFICIAL USE

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AN EXCISE TAX, THE NEW FRG LAW DESIGNATED THE ELECTRICITY SUPPLIER AND NOT THE END-CONSUMER AS THE TAX DEBTOR, AND THAT THE CHARGE, VIS-A-VIS THE FORCES, IS THEREFORE NOT A TAX FROM WHICH THE FORCES ARE EXEMPTED UNDER ARTICLE 67(1) OF THE NATO SOFA SA. THE FINANCE MINISTRY HAS STATED FURTHER THAT THE LEVY IS PART OF AN "OPERATING COST" WITHIN THE MEANING OF ARTICLE 63(4)(D)(III) OF THE SA, RE

ARTICLE 63(8)(B) OF THE PROTOCOL OF SIGNATURE  
INCLUDING IN OPERATING COST THE COST OF THE SUPPLY OF  
"ELECTRICITY."

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FM AMEMBASSY BONN  
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INFO CINCUSAREUR HEIDELBERG

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5. IN ITS DISCUSSIONS WITH THE FINANCE MINISTRY,  
THE USAREUR REPS ALSO REPRESENTED THE OTHER SEND-  
ING STATES FORCES (FRENCH, CANADIAN, UK, BELGIAN,  
AND DUTCH). UPON RECEIPT OF THE NEGATIVE, WRITTEN  
RESPONSE OF THE FINANCE MINISTRY, THERE WERE  
SEVERAL COORDINATING MEETINGS IN BONN OF REPS OF  
THE SENDING STATES, WITH A VIEW TO REACHING AGREE-  
MENT ON THE LANGUAGE OF AN AIDE-MEMOIRE TO RAISE  
FORMALLY WITH THE FRG FOREIGN OFFICE THE QUESTION  
OF SENDING STATES FORCES EXEMPTION FROM THE OBLI-  
GATION TO PAY THIS LEVY. IT WAS AGREED THAT IN  
THE MEANTIME AND UNTIL THE MATTER IS SETTLED, THE  
SENDING STATES FORCES WOULD DEDUCT THE 3.24 PER  
CENT LEVY FROM THE ELECTRICITY BILLS RECEIVED FOR  
ELECTRIC SERVICES PROVIDED AFTER JANUARY 1, 1975.  
ALL FORCES HAD AGREED THAT NON-PAYMENT WAS PREFER-

ABLE IN PRESERVING THE SENDING STATE'S POSITION  
TO PAYMENT OF THE LEVY UNDER PROTEST. WITH THE  
EXCEPTION OF THE FRENCH AND THE DUTCH THIS HAS  
UNIFORMLY BEEN DONE SINCE JANUARY BY THE SENDING  
STATES FORCES THROUGHOUT THE FRG; FRENCH AND DUTCH  
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HAVE NOW ALSO CONFORMED TO THAT PRACTICE. HOWEVER, SOME  
OF THE ELECTRIC POWER COMPANIES HAVE WRITTEN THAT FOR  
THE EVENTUALITY THAT THE DISCUSSION OF THIS MATTER  
BETWEEN

THE SENDING STATES AND THE FRG RESULTS IN AN ULTIMATE  
OBLIGATION ON THE PART OF THE FORCES TO PAY THE LEVY,  
THE POWER COMPANIES WERE RESERVING THEIR RIGHT TO  
CHARGE INTEREST TO THE FORCES, PRESUMABLY AS THE POWER  
COMPANIES WOULD BE LIABLE FOR INTEREST TO THE SPECIAL  
FUND FOR LATE PAYMENT OF THE LEVY WITH RESPECT TO POWER  
PREVIOUSLY SUPPLIED TO THE FORCES. MOST SENDING STATES  
REPS HAVE INDICATED THAT THEY WOULD STRONGLY RESIST  
EFFORTS TO FORCE THEM TO PAY INTEREST IN THIS EVENTUAL-  
ITY. THE EMBASSY UNDERSTANDS THAT USAREUR IS STUDYING  
POSSIBLE STEPS TO PERMIT THE US FORCES TO CONTINUE WITH  
THOSE OF THE OTHER SENDING STATES TO REFUSE PAYMENT OF  
THE LEVY BEYOND JUNE 30, 1975 WITH RESPECT TO CURRENT  
PROVIDED SINCE JANUARY 1, 1975, EVEN IF THIS MATTER HAS  
NOT BEEN RESOLVED BETWEEN GOVERNMENTS BY THAT TIME.

6. AT THE MOST RECENT MEETING OF THE SENDING  
STATES REPS, AGREEMENT WAS REACHED ON AN AD REFERENDUM  
TEXT OF AN AIDE-MEMOIRE TO BE DELIVERED BY THE US  
EMBASSY ON BEHALF OF ALL THE SENDING STATES EMBASSIES.  
THE DRAFT AIDE-MEMOIRE ARGUES NON-LIABILITY ONLY ON  
THE BASIS OF EXEMPTION FROM THE PAYMENT OF TAXES UNDER  
SA ARTICLE 67(1) AND DOES NOT SEEK TO MAKE THE POLITICAL  
ARGUMENT THAT THE SENDING STATE FORCES CANNOT BE EX-  
PECTED TO HELP FINANCE A FUND DESIGNED TO PROVIDE AN  
INCENTIVE FOR INCREASED USE OF COAL IN POWER  
PRODUCTION AND TO COVER COSTS OF CONSTRUCTING TEN MAJOR  
NEW COAL-FIRED POWER PLANTS BY 1980. IT WAS AGREED  
THAT THIS ARGUMENT SHOULD BE HELD IN RESERVE FOR USE  
IF THE LEGAL ARGUMENT IN THE DRAFT TEXT OF THE AIDE-  
MEMOIRE, DOES NOT SUCCEED. IT IS ENVISAGED THAT IF THE  
POLITICAL ARGUMENT MUST BE MADE, IT MIGHT BE MADE AT  
THE MINISTERS LEVEL OF THE SEVERAL SENDING STATES  
EMBASSIES AT BONN. WHILE THE US FORCES DO NOT CHARGE  
ELECTRIC UTILITIES TO FORCE MEMBERS RESIDING ON OR OFF  
POST, MOST OF THE SENDING STATES DO SO; THIS EXPLAINS  
THE THRUST OF PARA 4 OF THE DRAFT NOTE AND THE REFER-  
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ENCE THEREIN TO ARTICLE 68 DEALING WITH MEMBERS OF THE  
FORCES (AS OPPOSED TO ARTICLE 67 DEALING WITH TAXATION  
OF THE FORCES THEMSELVES).

7. THE TEXT OF THE AIDE-MEMOIRE AGREED AD REFERENDUM

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FM AMEMBASSY BONN

TO SECSTATE WASHDC 8916

INFO CINCUSAREUR HEIDELBERG

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IS AS FOLLOWS:

BEGIN TEXT

(1) THE EMBASSY OF THE UNITED STATES OF AMERICA, ON  
BEHALF OF THE EMBASSIES OF THE STATES PARTIES TO THE  
SUPPLEMENTARY AGREEMENT TO THE NATO STATUS OF FORCES  
AGREEMENT ("THE SENDING STATES") WISHES TO DRAW THE  
ATTENTION OF THE AUSWAERTIGES AMT TO THE QUESTION OF  
THE APPLICABILITY TO THE SENDING STATES FORCES OF THE  
FEDERAL LAW TO SECURE ELECTRICITY PRODUCTION FROM COAL  
IN THE FEDERAL REPUBLIC OF GERMANY ("DRITTES VER-  
STROMUNGSGESETZ) (BGB 1 1974 I 3473). ACCORDING TO

A COMMENTARY SUBMITTED TO THE BUNDESTAG BY THE GOVERNMENT (DRUCKSACHE 7/1991 OF 16 APRIL 1974) THE LAW IS INTENDED TO INFLUENCE THE ECONOMY OF THE FRG BY BALANCING OUT FINANCIAL INEQUALITIES WITHIN THE ELECTRICITY SUPPLY INDUSTRY AND MORE SPECIFICALLY BY FACILITATING THE FINANCING OF ENTERPRISES ENGAGED IN THE PRODUCTION OF ELECTRICITY FROM COAL.

(2) THE AUTHORITIES OF THE SENDING STATES HAVE CAREFULLY CONSIDERED THE ISSUES INVOLVED AND HAVE CONCLUDED THAT THEY ARE NOT LIABLE TO PAY THE EQUALISATION LEVY (AUSGLEICHSSABGABE) WHICH IS PROVIDED FOR IN THE LAW LIMITED OFFICIAL USE

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REFERRED TO ABOVE, EITHER IN THEIR CAPACITY AS CONSUMERS OR IN THEIR CAPACITY AS SELF-PRODUCERS. THEY CONSIDER THAT THE EQUALISATION LEVY CONSTITUTES A TAX FROM WHICH THE SENDING STATES FORCES ARE EXEMPT.

(3) THE SENDING STATES RIGHTS IN THIS MATTER REST UPON THE RELEVANT PROVISIONS OF THE SUPPLEMENTARY AGREEMENT TO THE NATO STATUS OF FORCES AGREEMENT. IN PARTICULAR, THE EXEMPTION FROM TAXATION LAID DOWN IN ARTICLE 67(1) OF THE SUPPLEMENTARY AGREEMENT, WHEN INTERPRETED IN ACCORDANCE WITH THE GENERAL RULES OF INTERNATIONAL LAW AND TAKEN IN ITS CONTEXT, PROVIDES A WIDE EXEMPTION WHICH WOULD, IN THE VIEW OF THE AUTHORITIES OF THE SENDING STATES, INCLUDE THE NEW EQUALISATION LEVY. THIS IS SUPPORTED BY THE FACT THAT OTHER ARTICLES OF THE SUPPLEMENTARY AGREEMENT DEAL SPECIFICALLY WITH PARTICULAR KINDS OF TAXATION, THUS LEAVING THE TERM "TAXATION" IN ARTICLE 67(1) TO BE INTERPRETED IN ACCORDANCE WITH ITS ORDINARY MEANING.

4. THE PROTOCOL OF SIGNATURE RE ARTICLE 68 OF THE SUPPLEMENTARY AGREEMENT REQUIRES THE FEDERAL GOVERNMENT TO BE GUIDED BY THE ENDEAVOUR TO AVOID ANY BURDENS ON MEMBERS OF A FORCE OR OF A CIVILIAN COMPONENT OR ON DEPENDENTS THAT APPEAR UNJUSTIFIED IN THE LIGHT OF THE PURPOSE AND THE SPECIAL CONDITIONS OF THEIR PRESENCE IN THE FEDERAL REPUBLIC. THE AUTHORITIES OF THE SENDING STATES WISH TO POINT OUT TO THE AUSWAERTIGES AMT THAT IF THE COST OF THE EQUALISATION LEVY WERE TO BE PASSED ON TO THE SENDING STATES FORCES IT WOULD, IN THEIR VIEW, BE INCONSISTENT WITH THIS PROVISION OF THE PROTOCOL OF SIGNATURE.

(5) THE AUTHORITIES OF THE SENDING STATES WISH TO INFORM THE AUSWAERTIGES AMT THAT THEIR FORCES HAVE NOTIFIED THE RELEVANT UTILITY SUPPLIERS THAT THEY MUST DECLINE PAYMENT OF THE EQUALISATION LEVY AND THAT THIS MATTER IS THE SUBJECT OF DISCUSSIONS BETWEEN THE SENDING STATES AND FEDERAL AUTHORITIES. THE FEDERAL MINISTRY OF FINANCE HAS BEEN INFORMED OF THIS DECISION.

IN THE MEANTIME, CERTAIN UTILITY SUPPLIERS HAVE INFORMED  
A NUMBER OF SENDING STATES FORCES OF THEIR INTENTION TO  
ADD INTEREST TO THE UNPAID LEVY IF IT SHOULD LATER BE  
DETERMINED THAT THE SENDING STATES FORCES ARE OBLIGED  
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FM AMEMBASSY BONN

TO SECSTATE WASHDC 8917

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TO PAY THE LEVY. THE AUTHORITIES OF THE SENDING STATES  
CANNOT AGREE THAT THEY COULD BE LIABLE TO PAY INTEREST  
ON SUMS DEMANDED IN RESPECT OF TAXATION FROM WHICH  
THEY CONSIDER THEY ARE EXEMPT AND ABOUT WHICH CLARI-  
FYING DISCUSSIONS BETWEEN GOVERNMENTS ARE NECESSARY IN  
VIEW OF THE TREATY OBLIGATIONS WHICH EXIST BETWEEN THEM.  
(6) THE EMBASSY OF THE UNITED STATES OF AMERICA, ON  
BEHALF OF THE EMBASSIES OF THE SENDING STATES, REQUESTS  
THE ASSISTANCE OF THE AUSWAERTIGES AMT IN ENSURING, IN  
ACCORDANCE WITH THE RELEVANT PROVISIONS OF THE SUPPLE-

MENTARY AGREEMENT TO THE NATO STATUS OF FORCES AGREEMENT, EXEMPTION FOR THE SENDING STATES FROM PAYMENT OF THE NEW EQUALISATION LEVY.  
END TEXT

7. ACTION REQUESTED: THE NECESSARY CLEARANCE TO THE DELIVERY OF THE AIDE-MEMOIRE QUOTED ABOVE. IN THIS CONNECTION EMBASSY URGES THAT IT BE BORNE IN MIND THAT THIS LANGUAGE REPRESENTS A COMMON DENOMINATOR AMONG THE REPS OF THE SIX SENDING STATES, AND THAT CHANGES, PARTICULARLY MAJOR ONES, MUST BE NEGOTIATED AND MAY REQUIRE FURTHER CLEARANCES FOR ALL FROM CAPITALS, THUS LIMITED OFFICIAL USE

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INVOLVING CONSIDERABLE DELAY AND THE POSSIBILITY OF STILL FURTHER DISCUSSIONS. AUTHORISATION TO DELIVER THE AIDE-MEMOIRE WITH THIS TEXT IS REQUESTED BY APRIL 1 IF AT ALL POSSIBLE.  
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